



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Data Systems Marketing Corporation

File: B-228888

Date: December 18, 1987

DIGEST

1. Permitting one of two offerors to perform a second equipment demonstration (after first demonstration did not show the proposed computer system met all compatibility requirements) following receipt of best and final offers without reopening discussions with second offeror is unobjectionable where: (1) second offeror already had performed fully successful equipment demonstration; and (2) agency did not contemplate further discussions or proposal revisions based on the second demonstration. Under the circumstances, second demonstration merely verified proposed system and did not constitute discussions.
2. Allegations stemming from presence of competitor's technician at protester's equipment demonstration, and alleged resulting competitive advantage, are untimely and will not be considered where record shows protester was aware of competitor's presence at time of demonstration, but did not file protest within 10 working days after agency request for best and final offers, the point at which protester should have known competitor might be able to gain advantage from presence at demonstration.

DECISION

Data Systems Marketing Corporation (DSM) protests the award of a contract to Unisys Corporation under request for proposals (RFP) No. N00189-87-R-0235, issued by the Naval Supply Center, Norfolk, Virginia. The RFP was for a firm, fixed-price contract to supply high-speed random-access disk subsystems for computer operating systems at the Fleet Combat Director Systems Support Activity, Virginia Beach, Virginia. The RFP basically provided that the least-costly, technically acceptable proposal would be in line for award, and that an Operational Capability Demonstration (OCD) by each offeror would be utilized in determining the successful offeror. DSM challenges the award to Unisys on several grounds. We deny the protest in part and dismiss it in part.

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The RFP's specifications, in the first paragraph, explained that the disk subsystems would become part of the SHARE/7-SHARE/43 computer operating systems, comprised of Unisys computers. The subsystems also would be required to operate with the VAX 11/780 system, comprised of Digital Equipment Corporation computers. The RFP stated that "a successful demonstration of the subsystem shall be conducted on the existing SHARE/43, SHARE/7 and VAX 11/780 systems," the intent being to assure that the disk subsystems would be capable of operating with the listed computers.

Two proposals were received, one from Unisys priced at \$560,514, and one from DSM priced at \$741,108. The initial technical review concluded that both proposals were acceptable, although it was noted that Unisys incorrectly had interpreted the RFP as not really requiring compatibility with the VAX 11/780 computers; Unisys stated in its proposal that the VAX 11/780 was not applicable. The Navy proceeded to the OCD phase of the evaluation, advising Unisys that its proposed system would in fact have to operate with both the SHARE and VAX systems. Unisys agreed and conducted its OCD first; its proposed system did not operate with the VAX system. DSM subsequently conducted a successful OCD with its system. Because the Navy had a contract with Unisys to maintain some of the facility's computers and had a policy requiring the contractor to make any cable connections on equipment the contractor maintained, the Navy summoned a Unisys engineer to connect, or be present at the connection of, DSM's equipment to the SHARE and VAX systems.

After the initial OCDs, the Navy conducted discussions, notifying Unisys of deficiencies in its proposal, including its failure to demonstrate its equipment's ability to interface with the VAX system, and notifying DSM that its proposal was technically acceptable in all areas. Both offerors were requested to submit best and final offers (BAFOs) by a common date, and did so. Unisys revised its proposal in a manner the Navy found corrected the deficiencies, but the Navy wanted Unisys to perform a second OCD to assure that the proposed system would interface with the VAX system. A second OCD was conducted 3 weeks after the date for submitting BAFOs. Unisys successfully performed the second OCD and was awarded the contract based on its low price, \$560,514, which was approximately 20 percent lower than DSM's BAFO price of \$676,716.

DSM's first complaint is that permitting Unisys a second OCD violated the terms of the RFP, which stated that in the event the offeror was unable to complete the benchmark within 2 hours due to malfunction of the offeror's equipment, the offeror would be allowed an opportunity for a

rerun which must be successfully completed within 5 working days of the original OCD. DSM points out that Unisys' equipment did not malfunction, but was incompatible with the VAX systems, and that Unisys' second OCD was held more than 5 days after the first OCD. In any case, DSM maintains it was improper to permit Unisys to rerun its OCD after receipt of BAFOs without also reopening discussions with DSM and affording DSM an opportunity to revise its price.

The precise language of the RFP notwithstanding, since the Navy considered Unisys' proposal susceptible of being made acceptable after the first OCD, we see nothing objectionable in the decision to retain Unisys in the competition at that point. In this regard, the Navy believed Unisys honestly had misinterpreted the specifications; Unisys was the only offeror other than DSM; and Unisys' price was substantially below DSM's. We have criticized applying strict pass/fail standards in the evaluation of benchmarks or OCDs, that lead to the automatic and final exclusion of a potentially acceptable proposal, see Aydin Corporation, B-224354, Sept. 8, 1986, 86-2 CPD ¶ 274, and our view is stronger where, as here, eliminating an offeror would leave only one firm in the competition.

It also was not improper for the Navy to conduct Unisys' second OCD after receipt of BAFOs without reopening discussions with DSM. Although we have recognized that post-BAFO benchmarking ordinarily may be inappropriate because such testing often is conducted for purposes of further negotiations, CompuServe Data Systems, Inc., 60 Comp. Gen. 468 (1981), 81-1 CPD ¶ 374, we also have held that where the testing is for evaluation purposes only, and further negotiations are not contemplated, such post-BAFO testing is unobjectionable. See Id.; Control Data Corp. and KET, Inc., 60 Comp. Gen. 548 (1981), 81-1 CPD ¶ 531 (solicitation provision permitting testing of proposed awardee's equipment after BAFOs to determine compatibility with existing system is unobjectionable).

Here, the Navy conducted Unisys' second OCD, not as part of the negotiations process, but solely to validate the acceptable system described in Unisys' BAFO, and Unisys was not afforded an opportunity to alter its BAFO. Since DSM already had successfully performed its OCD, there was no reason to test DSM's system after BAFOs, and since the agency was not seeking further proposal revisions, there was no basis for giving DSM an opportunity to reduce its price further.

DSM further complains that the Navy relaxed the OCD requirements for Unisys, asserting that, at considerable cost, DSM produced for its OCD a fully-developed disk

subsystem that complied with all the specifications, whereas Unisys did not. While it is not clear from the record precisely what equipment was tested at Unisys' OCDs, the contracting officer reports that Unisys did demonstrate acceptable equipment under the RFP and the report on the second OCD indicates satisfactory performance of the tested equipment. In any case, Section C of the RFP reserved to the government the right to waive the OCD altogether; given this provision, we believe the Navy properly could have permitted any offeror to demonstrate all or only a portion of its system, depending upon what the Navy determined was necessary for a particular offeror to establish its equipment's acceptability.

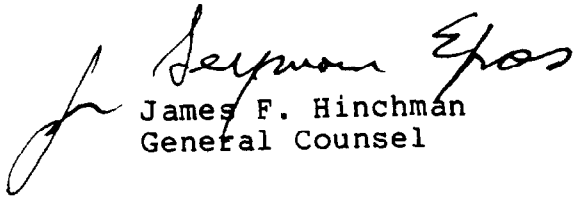
DSM also protests that: (1) the Navy improperly permitted a Unisys technician to view its system at the OCD, resulting in Unisys using DSM technology to achieve compatibility with the VAX system; (2) that the Navy violated DSM's technical data rights by requiring DSM to perform the OCD in front of the Unisys technician; and (3) that Unisys gained an unfair technical advantage in being permitted to have a technician present during the OCD.

Under our Bid Protest Regulations, 4 C.F.R. part 21 (1987), protest allegations must be raised no later than 10 working days after the basis of protest was known or should have been known. 4 C.F.R. § 21.2(a)(2). Here, DSM was fully aware of the Unisys technician's presence at the OCD at the time of the test. DSM states that it objected to Navy personnel at the time, but did not protest the Unisys presence because it was aware that Unisys already had submitted its proposal and conducted its OCD, and thus assumed Unisys could gain no advantage. This argument appears reasonable only up to July 21, when DSM was asked to submit a BAFO; at this juncture, it should have been clear to DSM that the competition was not yet closed and that Unisys could be given an opportunity to take advantage of any information allegedly obtained at the OCD. Because DSM did not protest on these grounds within 10 days after learning that the competition remained open, they are untimely.

We have examined the record, moreover, and find no clear evidence that the Unisys technician did in fact view the workings of DSM's system. While DSM supports its allegations in this regard with affidavits of its employees present at the OCD, the Navy refutes the allegations with affidavits from government, Unisys, and third party contractor employees. While it is clear from all of these statements that DSM's computer cabinets were opened at some point, there is no persuasive evidence, and the government

affidavits deny, that the Unisys technician ever viewed any proprietary DSM system technology.

The protest is denied in part and dismissed in part.

A handwritten signature in cursive script, appearing to read "James F. Hinchman".

James F. Hinchman
General Counsel